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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**THIRD OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED, IN WHOLE OR IN
PART, UPON INVESTMENT IN DEL
VALLE HOMES, LLC ISLETON
LOAN EXCEPT FOR AMOUNTS
DESIGNATED AS "UNREMITTED
PRINCIPAL"; AND CERTIFICATE
OF SERVICE**

Date of Hearing: April 10, 2009

Time of Hearing: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 26, 2007.

1 order disallowing the Proofs of Claim filed by individual investors (“Direct Lenders”)
2 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are
3 based upon an investment in the Del Valle Homes, LLC Isleton Loan (the “Del Valle –
4 Isleton Loan”) that has been repaid to the Direct Lenders. This Objection is supported by
5 the Court’s record and the Declaration of Edward M. Burr in Support of Omnibus
6 Objections to Proofs of Claim Based Upon the Investment in Del Valle Homes, LLC
7 Isleton Loan filed with the Court today (the “Burr Decl.”).

8 **I. INTRODUCTION**

9 1. On about May 23, 2006, the borrower paid off the Del Valle – Isleton Loan
10 in full. In turn, USACM distributed the proceeds from the Del Valle – Isleton Loan to the
11 Direct Lenders who invested in the Del Valle – Isleton Loan. However, Mesirow
12 Financial Interim Management, LLC (“Mesirow”) determined that some of the proceeds
13 from the Del Valle – Isleton Loan were diverted by USACM and thus never paid to the
14 Direct Lenders (“Unremitted Principal”). Minus Unremitted Principal, the Direct Lenders
15 were paid in full on the Del Valle – Isleton Loan, subject to servicing fees and any other
16 charges under their respective Loan Servicing Agreements and this Court’s orders,
17 including the Confirmation Order.

18 2. To the extent the Direct Lenders were paid, there is no longer any basis for a
19 Direct Lender claim against USACM based upon an investment in the Del Valle – Isleton
20 Loan and the USACM Trust objects to those amounts. As for Unremitted Principal, the
21 USACM Trust asks that the Court allow those amounts as general unsecured claims. A
22 break down of each Direct Lender’s claim on the Del Valle – Isleton Loan, including the
23 amount of Unremitted Principal to be allowed as a general unsecured claim, is listed in
24 **Exhibit A**, attached.

1 **II. JURISDICTION**

2 1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334
3 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
4 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

5 2. The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and
6 Bankruptcy Rule 3007.

7 **III. BACKGROUND**

8 1. On April 13, 2006 (“Petition Date”), USACM, USA Securities, LLC (“USA
9 Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital Diversified
10 Trust Deed Fund, LLC (“DTDF”), USA Capital First Trust Deed Fund, LLC (“FTDF,”
11 together with DTDF, the “Funds”) (collectively, the “Debtors”), filed voluntary petitions
12 for relief under chapter 11 of the Bankruptcy Code. Debtors continued to operate their
13 businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the
14 Bankruptcy Code. Debtors’ post-petition management of the Debtors was under the
15 direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC
16 (“Mesirow”), who served as the Chief Restructuring Officer.

17 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
18 business of underwriting, originating, brokering, funding and servicing commercial loans
19 primarily secured by real estate, both on behalf of investors and for its own account.

20 3. That business included the solicitation of individual investors to purchase
21 fractional interest in loans that USACM originated and then serviced. These investors,
22 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in
23 USACM’s bankruptcy case and in this Objection.

24 4. Although USACM serviced and sometimes originated the loans in which the
25 Direct Lenders invested, generally USACM was not a borrower on these loans.
26

1 5. On September 14, 2006, the Court entered its Order Setting Deadline to File
2 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The Bar
3 Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the
4 deadline (“Bar Date”) for creditors to file proof of claims.

5 6. On September 25, 2006, Debtors served a copy of the Bar Date Order on
6 their service lists [Docket No. 1358]. All Creditors, including the Direct Lenders, were
7 served with a copy of the Bar Date order as well [Docket No. 1358].

8 7. On November 6, 2006, a stipulation was filed and an order entered extending
9 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket
10 No. 1729].

11 8. On January 8, 2007, this Court entered its Order Confirming the “Debtors’
12 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.
13 2376] (the “Confirmation Order”).

14 9. Under the Plan, the USACM Trust is the successor to USACM with respect
15 to standing to seek allowance and disallowance of Claims.

16 10. Under the Plan, unsecured claims of Direct Lenders against USACM are
17 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in
18 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share of
19 the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,
20 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and
21 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”

22 11. The USACM Trust exists as of the Effective Date of the Plan, which was
23 March 12, 2007. Geoffrey L. Berman is the Trustee.

24 12. **Exhibit A** to this Objection lists Proofs of Claim filed by Direct Lenders that
25 appear to be based, in part, upon an investment in the Del Valle – Isleton Loan. (Burr
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1 Decl. ¶ 7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's
2 address, the total amount of the claim, the total amount of the claim that appears to be
3 related to an investment in the Del Valle – Isleton Loan based upon the information
4 provided by the claimant, and the total amount of Unremitted Principal scheduled by
5 Mesirow. (Burr Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the
6 Del Valle – Isleton Claims.

7 13. The column listing “Unremitted Principal” on **Exhibit A** represents amounts
8 determined by Mesirow to be General Unsecured Claims held against the USACM Estate
9 as a result of USACM collecting principal from a Borrower under a loan, but not remitting
10 such principal to the Direct Lender. (Burr Decl. ¶ 8.) Amounts designated as Unremitted
11 Principal are documented in the Third Amendment to Bankruptcy Schedule F-1 of the
12 Schedules and Statements filed on March 20, 2007. (Burr Decl. ¶ 8.)

13 14. On or about May 23, 2006, the Del Valle – Isleton Loan was paid off in full,
14 as reflected in USACM's books and records. (Burr Decl. ¶ 9.) Shortly thereafter, USACM
15 processed the payoff and distributed the proceeds to the Direct Lenders on the Del Valle –
16 Isleton Loan. (Burr Decl. ¶ 9.)

17 15. Minus Unremitted Principal, the Direct Lenders were in turn paid in full,
18 subject to servicing fees and any other charges under their respective Loan Servicing
19 Agreements and this Court's orders, including the Confirmation Order. In general, the
20 Direct Lenders received their principal and interest on the Del Valle – Isleton Loan, less
21 Unremitted Principal and sums withheld for servicing fees, servicer advances, Prepaid
22 Interest and sums known as the 2% Holdback pursuant to the Confirmed Plan. On the
23 Effective Date of the Plan, the Prepaid Interest was applied, a portion of the 2% Holdback
24 was applied to the allowed claims of the Direct Lender Committee, and the balance paid to
25 the Direct Lenders. (Burr Decl. ¶ 10.)
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1 16. Accordingly, the USACM Trust no longer has further obligations to the
2 Direct Lenders arising out of the Del Valle – Isleton Loan to the extent that loan has been
3 repaid to the Direct Lenders, pursuant to USACM’s books and records. (Burr Decl. ¶ 11.)

4 **IV. APPLICABLE AUTHORITY**

5 1. Under the Bankruptcy Code, any Claim for which a proof of claim has been
6 filed will be allowed unless a party in interest objects. If a party in interest objects to the
7 proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim
8 and shall allow the Claim except to the extent that the Claim is “unenforceable against the
9 debtor . . . under any . . . applicable law for a reason other than because such claim is
10 contingent or unmatured.” 11 U.S.C. § 502(b).

11 2. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.
12 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such
13 objections has been extended to February 12, 2008, by this Court’s orders.

14 3. A properly filed proof of claim is presumed valid under Bankruptcy Rule
15 3001(f). However, once an objection to the proof of claim controverts the presumption, the
16 creditor ultimately bears the burden of persuasion as to the validity and amount of the
17 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,
18 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996). The ultimate
19 burden of proof as to the validity of a proof of claim “remains at all times upon the
20 claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039
21 (9th Cir. 2000).

22 **V. OBJECTION TO CLAIMS LISTED IN EXHIBIT A**

23 1. **Exhibit A** attached and incorporated by this reference lists the Del Valle –
24 Isleton Claims. The USACM Trust objects to these claims to the extent they are based
25 upon an investment in the Del Valle – Isleton Loan that USACM repaid to the Direct
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1 Lenders. According to USACM's books and records as reconstructed by Mesirow, the Del
2 Valle – Isleton Loan has been repaid in full, and the Direct Lenders have received such
3 payment, except for Unremitted Principal, as provided by the applicable Loan Servicing
4 Agreement, this Court's orders and the Confirmation Order.

5 2. As for the amounts designated as Unremitted Principal on **Exhibit A**, the
6 USACM Trust moves the Court to allow those amounts as general unsecured claims.

7 3. Certain of the Del Valle – Isleton Claims may be the subject of subsequent,
8 and perhaps multiple, objections if they are being asserted on the basis of multiple
9 investments through USACM. Such Claims may also be subject to prior or subsequently
10 filed objections, and this objection is without prejudice to any other objection by any party
11 in interest, including the USACM Trust.

12 4. The USACM Trust reserves the right to further object to any and all Claims,
13 whether or not the subject of this Objection, for allowance and/or distribution purposes on
14 any other grounds. The USACM Trust further reserves the right to modify, supplement
15 and/or amend this Objection as it pertains to any Claim or claimant herein.

16 5. For the convenience of the Court and the parties, the USACM Trust will
17 endeavor to file any subsequent objections to the Claims on a loan by loan basis. Thus, this
18 Objection is one of a series of many potential objections to those Claims that are asserted,
19 in whole or in part, on the basis of an investment that has been repaid in full.
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1 **VI. CONCLUSION**

2 The USACM Trust respectfully requests that the Court allow the amounts listed as
3 “Unremitted Principal” on Exhibit A, but disallow the claims listed in **Exhibit A** to the
4 extent those claims are based upon a Direct Lender investment in the Del Valle – Isleton
5 Loan. The USACM Trust also requests such other and further relief as is just and proper.

6 Dated: March 3, 2009.

7 LEWIS AND ROCA LLP

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9 By /s/ John Hinderaker (#18024)
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14 Copy of the foregoing mailed by first class
15 Postage prepaid U.S. mail
16 On March 3, 2009 to:

17 All parties in interest listed on
18 Exhibit A attached

19 /s/ Renee L. Creswell
20 Renee L. Creswell
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